

Advanced Income Tax Seminar

March 19 - 20 2018

Advanced Sales / Use Tax Seminar

March 20 - 21, 2018

Advanced Property Tax Seminar

March 22 - 23, 2018

Advanced Sales Tax Seminar

STRANGER IN A STRANGE LAND:

Ethics and Multijurisdictional Practice Issues

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AGENDA

- Review ethical obligations of SALT practitioners in multijurisdictional practice (MJP) environment
- Consider admission-to-practice requirements for SALT accountants & lawyers
- Focus on IPT Code of Ethics, Uniform Accountancy Act and ABA Model Rules (and select state laws)
- Contrast federal practice requirements and challenges

HISTORY

- Territorial practice
- Emergence of MJP
 - Trans-border practice
 - Uniform Accountancy Act (1998): “substantial equivalency” fosters interstate practice by eliminating “artificial barriers”
 - ABA MJP report (2002): *Client Representation in the 21st Century*
- ABA SALT Committee Multistate Tax Practice Task Force

ETHICS RULES

- Institute for Professionals in Taxation Code of Ethics
<http://www.ipt.org/learncenter.asp?id=178410&page=29>
- American Institute of CPAs Statements on Standards for Tax Services
<http://www.aicpa.org/Research/Standards/Tax/Pages/default.aspx>
- American Bar Association Model Rules of Professional Conduct
http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html

DUTY OF COMPETENCY

- ***Always*** applies
- IPT Code of Ethics Preamble – obligation for competence of work
- Accountants – UAA: assure public of reasonable competence
- Attorneys – ABA MR 1.1: Duty to provide competent representation – legal knowledge, skill, thoroughness and preparation necessary for the representation
 - May have duty to inform client that attorney not licensed in foreign jurisdiction if representation occurs primarily there and requires knowledge of that law: ABA MR 5.5, comment 20 + MR 1.4(b)

CERTIFIED PUBLIC ACCOUNTANTS

- State law regulation of practice of public accountancy
 - Assure “minimum competence of practitioners”
- UAA: Joint model act of AICPA + NASBA
 - Substantial majority of states follow key terms
 - Enhance interstate reciprocity and practice across state lines
 - Remove artificial barriers to interstate practice and mobility of CPAs

CERTIFIED PUBLIC ACCOUNTANTS

- UAA (cont'd)
 - “Substantial Equivalency” – education, examination & experience requirements are comparable on a state or individual CPA level
 - Reciprocity & practice privileges w/o addt'l licensure, except principal place of business
 - Freely practice across state lines
 - “No notice, no fee and no escape”
 - Subject to regulation for professional conduct, even if performing services that non-licensee may perform

LAWYERS

- Each state regulates ‘practice of law’ within its borders
 - Definition varies by state
 - Admitted vs. authorized practice
- ABA Model Rule 5.5
 - 44± states have adopted in some form since 2002:
 - Verbatim; or
 - Jurisdiction-specific modifications

MODEL RULE 5.5 – *General Rule*

- Lawyer shall not practice law in another jurisdiction in violation of that jurisdiction’s regulation of legal profession
- Unless admitted to practice here, shall not:
 - Establish office “or other systematic and continuous presence” for practice of law; or
 - Hold out to public or otherwise represent that lawyer admitted to practice here

MODEL RULE 5.5 – 4 *Exceptions*

- Lawyer in good standing in another jurisdiction may provide legal services on ***temporary*** basis here if:
 - Associate local lawyer who actively participates in matter;
 - Services reasonably related to pending or potential proceeding in this or another jurisdiction if authorized by law or order to appear;
 - Services reasonably related to alternative dispute resolution proceeding arising out of practice in admitted jurisdiction and not requiring *pro hac vice* admission; or

MODEL RULE 5.5 – 4 *Exceptions* (cont'd)

- Arise out of or *reasonably related to lawyer's practice in jurisdiction where admitted*
- These four exceptions do not create unreasonable risk to clients, courts or public
- Exceptions form safe harbor
 - Fact that conduct not identified in MR does not imply that conduct is/is not authorized

MODEL RULE 5.5 (cont'd)

- Lawyer in good standing in another jurisdiction may provide legal services through an office or “other systematic and continuous presence” here if:
 - Services provided to lawyer’s **employer or affiliates** and do not require *pro hac vice* admission; or
 - Services authorized by federal or other law or rule
- If employee-lawyer establishes office or other systematic presence for purposes of rendering legal services to **employer**, may be subject to registration and other requirements (*e.g.*, client security fund assessments, mandatory CLE, etc.)

MODEL RULE 5.5 COMMENTS

- Lawyer may only practice law where authorized:
 - Admitted to practice on regular basis; or
 - Authorized by court rule, order or law to practice for limited purpose/restricted basis
- Other than as authorized by law or rule, non-admitted lawyer violates MR 5.5 if establishes office or other ***systematic and continuous presence*** here for practice of law

MODEL RULE 5.5 COMMENTS (cont'd)

- Presence may be systematic and continuous even if lawyer ***not physically present*** here
- No single test to determine whether lawyer's services are provided on a "temporary basis"
 - Services may be "temporary" even though provided on a recurring basis or for an extended period of time (*e.g.*, single lengthy negotiation or litigation)

MODEL RULE 5.5 COMMENTS (cont'd)

- ‘Reasonably related to lawyer’s practice in jurisdiction where admitted’:
 - Client previously represented by lawyer
 - Client resides in or has substantial contacts with jurisdiction where lawyer admitted
 - Matter has significant connection with jurisdiction where lawyer admitted
 - Significant aspects of lawyer’s work conducted in jurisdiction where admitted

MODEL RULE 5.5 COMMENTS (cont'd)

- Significant aspect of matter involves law of jurisdiction where lawyer admitted
- Client's business or legal issues involve multiple jurisdictions
- Services draw on lawyer's "recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, ***nationally-uniform***, foreign, or international law"

MODEL RULE 5.5 COMMENTS (cont'd)

- Lawyer subject to discipline both where practices law (authorized or otherwise) and where admitted to practice
- Authorization to practice in foreign jurisdiction does not authorize advertising legal services there

PRE-LITIGATION REPRESENTATION

- Audits, refunds, informal protests, ruling requests
 - Qualified Representatives – capable of representing taxpayer’s interests
 - CPAs – “move freely between states”
 - Attorneys - allowed per MR 5.5(c), comments 9 & 18
 - Authorized by law or informal practice of tribunal or agency
- **However**, out-of-state attorney may need *pro hac vice* admission – even if accountants and qualified representatives do not

PRE-LITIGATION – *Attorney Exceptions*

- *Pro hac vice* admission required for out-of-state attorney to appear before state revenue department:
 - IA, MS, SD
 - KS (maybe)
 - NE (contested hearings)
 - OH (UPL to negotiate with ODT if out-of-state attorney?)
 - OR (for informal conference appeals)

LITIGATION

- 40 states & D.C. allow admission by motion, following adoption of ABA MR 5.5 in 2002
 - **Not** in: CA, FL, DE, HI, LA, MD, MT, NV, NJ, RI, SC
- *Pro Hac Vice* Admission
 - Requirements vary by jurisdiction
 - Associate with local counsel
 - Limited number of appearances
 - Fees to Bar and/or trial court
 - Trial court's discretion
 - When to file:
 - BTA has jurisdiction over appeal filed by attorney not authorized to practice law in OH: *NASCAR Holdings* (2017)

LITIGATION

- *Pro hac vice* admission may be required for out-of-state attorney before tax tribunal or board
 - AL, GA (exc Small Claims Division), IL, KS, KY, LA, MA, MN, MO, MT (maybe), NV, NC, OH (*NASCAR?*), OK, OR, SC, WA (if reciprocity by home state)
- *Pro hac vice* admission required for judicial proceedings
- Accountants and other qualified representatives may handle formal administrative (APA) litigation

OTHER CONSIDERATIONS

- Lawyers working in Accounting or Tax Services Firms
 - Which rules apply?
- Malpractice insurance coverage for attorneys
 - Are you covered if engaged in unauthorized practice?

IRS - REPRESENTATION

- BEFORE THE INTERNAL REVENUE SERVICE
 - Any attorney; certified public accountant; enrolled agent; and (with certain restrictions) any enrolled actuary, retirement plan agent, or registered tax return preparer, not currently under suspension or disbarment from practice before the IRS. *31 CFR 10.3.*
 - Government (including State) officers and employees. *Id.; 31 CFR 10.5.*
 - *Pro se. Id.; 31 CFR 10.7.*

TAX COURT & U.S. DIST. COURT

- Before the U.S. TAX COURT
 - Practitioners admitted to the Tax Court bar, including attorneys and nonattorney applicants for admission to practice before the Court. *Tax Ct. XX R.P.P. 200.*
 - *Pro se. Id.*
- Before the U.S. DISTRICT COURTS
 - An attorney that is an active member in good standing of the highest court of any state or the District of Columbia (reciprocity rules), and Law students (see, e.g. USDC LCrR 44.1).

CHALLENGES TO STATE ADMISSION TO PRACTICE RULES IN FED. COURTS

- National Association For the Advancement of Multijurisdictional Practice – NAAMJP
 - Challenging U.S. District Court Rules which incorporate State Admission to Practice Rules.
 - Suing State Supreme Court Justices, Federal District Court Judges and the Attorney General in Official Capacity as Promulgators/Administrators of Admission Rules

CHALLENGES TO STATE ADMISSION TO PRACTICE RULES IN FED. COURTS

- Third Circuit – 799 F.3d 216 (2015)
 - Maryland Attorney denied admission to practice in Pennsylvania because Maryland did not have reciprocity agreement with PA which would allow a non-PA bar member to practice.
- U.S. Dist. Court for District of Columbia – 180 F. Supp. 3d 46 (2015)
 - Attorney with principal law office in Switzerland barred from practicing under D.C. admission rules.
- Fourth Circuit – 826 F.3d 191 (2016)
 - Attorneys challenging Maryland’s rule requiring reciprocity from District Courts in other states before allowing non-MD attorneys to practice in Maryland District Courts.

CHALLENGES TO STATE ADMISSION TO PRACTICE RULES IN FED. COURTS

- NAAMJP challenges under the following:
 - Fourteenth Amendment – Equal Protection
 - First Amendment – Freedom of Speech
 - Freedom of Association
 - Right to Petition
 - Privileges and Immunities Clause
 - Dormant Commerce Clause
 - Supremacy Clause
 - Due Process
 - Rules Enabling Act

CHALLENGES TO STATE ADMISSION TO PRACTICE RULES IN FED. COURTS

- Federal courts reject all of NAAMJP's challenges:
 - No Strict Scrutiny; only rational basis required
 - States have compelling state interest to regulate the practice of law within their borders
 - Regulation of profession, not regulation of speech based on content
 - No elevation of state law over federal law as nothing prohibits federal law from incorporating state law
 - Right to association not denied as remedy is to take bar exam in state where attorney wants to practice
 - Privileges of one state not guaranteed to be respected by another state
 - Discriminatory result of admission rules serves legitimate local purpose

QUESTIONS



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